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December 24, 2003

VIA ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: Petition of US LEC Corp. for a Declaratory Ruling Regarding LEC Access Charges for CMRS Traffic, CC Docket No. 01-92

Dear Ms. Dortch:

ITC^DeltaCom Communications, Inc. ("ITC^DeltaCom"), through its counsel, respectfully submits this *ex parte* in the above-referenced proceeding. US LEC's practice of imposing the full benchmark rate on interexchange carriers ("IXCs") for CMRS-originated traffic when US LEC performs a nominal and wholly unnecessary routing function is unlawful under Commission precedent as well as the Communications Act of 1934, as amended (the "Act").

In its petition, US LEC claimed to be raising a straightforward legal question: whether a CLEC can impose access charges on CMRS-originated traffic that transits the CLEC's network. As ITC^DeltaCom has previously documented, at the time US LEC initiated its practice of billing access charges on behalf of CMRS carriers, US LEC sought to hide from ITC^DeltaCom the true nature of the traffic, instead presenting the traffic as if it were US LEC-originated landline traffic. Only after its cover was blown did US LEC bring its practice out into the open, while inventing various see-through legal and policy rationales as a *post hoc* justification. US LEC's concerted efforts to hide the CMRS-originating nature of this traffic shows that US LEC suspected or knew at the time that this practice was contrary to FCC decisions and applicable statutory prohibitions on unjust and unreasonable practices. *E.g.,* 47 U.S.C. § 201(b).

ITC^DeltaCom has previously demonstrated at length that US LEC's routing and charging practices violate the FCC's *Sprint PSC Declaratory Ruling*, 17 FCC Rcd 13192 (2002),

and the *CLEC Benchmark Order,* 16 FCC Rcd 9923 (2001). Rather than repeat this analysis here, we attach to this letter a copy of our *ex parte* letter dated September 11, 2003. It bears emphasis that US LEC cannot point to any basis in any FCC rule or decision for its putative belief that this practice was lawful when US LEC first commenced it. In particular, US LEC argues that the FCC endorsed its billing practice in a single sentence in a *Notice of Proposed Rulemaking* in 1996. However, the Commission already rejected reliance on that sentence in the *Sprint PCS* decision, 17 FCC Rcd at ¶ 9.

It should be noted that the FCC did not purport to change existing law when it adopted the *Sprint PCS* decision. The Commission did not implement new rules or modify existing rules. Instead, the FCC simply clarified what the law was, and always had been, regarding access charges for CMRS-originated traffic. As a result, US LEC can hardly claim that the *Sprint PCS* decision represents a change in law that caught it by surprise.

Similarly, the *CLEC Benchmark Order* also does not offer a safe harbor for US LEC's routing and charging practices. Paragraph 55 and other passages in the *CLEC Benchmark Order* plainly prohibit a carrier, like US LEC, from billing the full benchmark rate when it does not provide all originating access functions. While paragraph 55 gives carriers a certain amount of flexibility in structuring its charges, it prohibits the CLEC from charging the full benchmark rate if it does not provide all originating access functions. In addition, the *CLEC Benchmark Order* arose from the FCC's desire to address access charges for services provided to ***end-user subscribers***. The decision was not intended to, and did not, address the situation where a CLEC provides transit routing for another carrier. In this routing scenario, US LEC solely is transiting a CMRS providers' traffic; US LEC is not routing calls made by its wireline end user subscribers. Hence, there can be no argument that the *CLEC Benchmark Order* authorized or permitted US LEC's billing and charging schemes for serving as a transit carrier for CMRS carriers.

The pertinent question before the Commission is whether a ruling that US LEC's routing and charging practice is unlawful should apply to US LEC's conduct (what some parties have chosen to call a retroactive application), or should be effective on a prospective basis only. As ITC^DeltaCom proved in its September 11, 2003 *ex parte*, it is a well-established, natural and sensible rule that an agency decision clarifying its rules and policies applies to the case at hand. This is the accepted rule for judicial decisions as well as agency decisions, and it applies even when the contours of the law or policy were unsettled or unclear at the time the conduct first occurred. ITC^DeltaCom submits that the Commission's rules and orders unequivocally prohibit US LEC's conduct. Nonetheless, if the Commission addresses US LEC's Petition by issuing a clarification of existing rules and policies, then the decision should apply to the facts at hand. Under established judicial and agency rulings, if the FCC's decisions and rules prohibited such conduct, or if the scope of the FCC's decisions and rules were ambiguous, the proper result is to apply any ruling to the conduct at hand. This is not a case where the FCC expressly declined to

issue a ruling addressing the lawfulness or regulatory consequences of particular types of conduct.

This doctrine makes sense because parties must take into account, and take responsibility for, the consequences of their actions. If all rulings were prospective only, the FCC would be encouraging unscrupulous companies to devise all manner of bogus schemes and nefarious routing and charging practices, knowing that any future FCC decision outlawing these practices would apply only prospectively.

It is a useful illustration to note that ITC^DeltaCom and other victims of US LEC's routing and charging scheme could have filed a Section 208 complaint against US LEC. It is inconceivable to think that the FCC would have granted such a complaint on a prospective basis only. Rather, the FCC would have ruled that the complained-of conduct was unlawful. There is no basis for a different approach when the Commission addresses improper behavior through a declaratory ruling. When parties undertake a course of action, they are responsible for taking into account the general statutory prohibitions against unjust and unreasonable conduct in 47 U.S.C. § 201(b), as well as applicable FCC decisions, such as the *Sprint PCS* decision and the *CLEC Benchmark Order*.

No party has documented a compelling basis for departing from the presumptive rule of law in this case. To the contrary, there are several compelling reasons for adhering to the presumptive rule here. In this case, prospective application would be particularly unfair because some CMRS carriers rejected this type of routing and charging arrangement, and they would be put at an unfair competitive disadvantage if other CMRS carriers are permitted to benefit from it. Moreover, prospective application would not clearly address or resolve whether this practice was, or was not, lawful at the time these practices occurred, thereby generating significant unnecessary litigation and maximizing legal fees and costs for all parties. Even after US LEC was put on notice last year that the IXCs objected to this practice and did not consent to these charges, US LEC has continued to engage in this practice and send invoices to ITC^DeltaCom and other IXCs. The Commission should not encourage parties to engage in misconduct up until the very last minute before their improper activities are formally struck down.

Please contact the undersigned at (202) 955-9600 if you have any questions regarding this filing.

Respectfully submitted,

/s/

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Attachment